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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE**

THE PEOPLE,

Plaintiff and Respondent,

A153950

v.

**(San Francisco County
Super. Ct. Nos. SCN 213752,
10009980, 14013460)**

JEFFREY K. ATKINS,

Defendant and Appellant.

_____ /

On January 5, 2018, Jeffrey K. Atkins pleaded guilty to first degree burglary in case No. 10009980 and he pleaded guilty to second degree burglary in case No. 14013460. (Pen. Code, §§ 459, 460.)¹ On January 29, 2018, the trial court sentenced Atkins to four years in prison for first degree burglary and to a concurrent sentence of three years in prison for second degree burglary with credits for 50 days served. Atkins appeals. Relying on section 1203.2a, Atkins contends the court had no jurisdiction to take his plea and sentence him in January 2018. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 21, 2010, Atkins pleaded guilty to first degree burglary (§§ 459, 460), and he admitted two prior serious felony convictions (§ 667, subd. (a)(1)). The court

¹ All undesignated statutory references are to the Penal Code.

dismissed a charge of second degree burglary and the remaining allegations.² The court sentenced Atkins to 14 years in prison but suspended execution of sentence and placed Atkins on five years of probation.

Between December 2012 and May 2014, the district attorney filed three motions to revoke Atkins's probation. On May 21, 2014, Atkins's probation was administratively revoked. After a number of continuances, on July 23, 2015, the court ordered Atkins to spend at least 30 days in a residential treatment program. On August 18, 2015, Atkins was released on his own recognizance on condition he remain in a drug treatment program and comply with his probation officer's recommendations. On August 27, 2015, Atkins's probation officer informed the court Atkins was not program compliant. The court revoked Atkins's release, issued a bench warrant for his arrest, and stated his probation remained administratively revoked.

On December 14, 2016, Atkins's probation officer informed the court that Atkins was prosecuted in San Mateo County and sentenced to 32 months in prison. On August 2, 2017, Atkins's attorney filed a motion to "dismiss the execution of his suspended sentence of 14 years," arguing the court lost jurisdiction by failing to commit Atkins within 60 days of being notified of Atkins's sentence in San Mateo County. The district attorney opposed the motion arguing Atkins "had not yet been sentenced in this probation violation matter, and therefore . . . was required to *request* sentencing" On August 25, 2017, the court denied the motion, finding it was "up to the defendant" to request that his sentence be imposed.

The court subsequently granted Atkins's motion to withdraw his 2010 plea, and Atkins pleaded guilty to first degree burglary in case No. 10009980 without admitting to the prior serious felony convictions. Atkins also pleaded guilty to a pending charge of second degree burglary committed in May 2014 in case No. 14013460. The court

² The minute order states Atkins pleaded guilty to count 2, which was a charge of second degree burglary, but it is clear from the reporter's transcript that he pleaded guilty to first degree burglary as charged in count 1, and that the count 2 charge of second degree burglary was dismissed.

sentenced Atkins to four years in prison for first degree burglary and to a concurrent term of three years in prison for second degree burglary.

Atkins appealed, and he requested a certificate of probable cause, arguing “the court lost jurisdiction to proceed in this case” when it failed to take action within 60 days of being informed that he “had been committed to prison by another county.” The trial court initially denied Atkins’s request, but, after this court issued a peremptory writ of mandate directing the court to grant the request, the trial court did so.

DISCUSSION

On appeal, Atkins argues the court lost jurisdiction in case No. 10009980 by failing to commit him within 60 days of the probation officer’s notice. (§ 1203.2a.)

Section 1203.2a provides in part that “[i]f any defendant who has been released on probation is committed to a prison in this state . . . for another offense, the court which released him or her on probation shall have jurisdiction to impose sentence, if no sentence has previously been imposed for the offense for which he or she was granted probation, . . . on the request of the defendant made through his or her counsel, or by himself or herself in writing [¶] . . . [¶] Upon being informed by the probation officer of the defendant’s confinement, . . . the court shall issue its commitment if sentence has previously been imposed. . . . If the case is one in which sentence has previously been imposed, the court shall be deprived of jurisdiction over defendant if it does not issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 60 days after being notified of the confinement.”

As noted by our high court, section 1203.2a “provides one set of procedures for probation with the imposition of sentence suspended and other procedures for probation with the execution of sentence suspended.” (*People v. Wagner* (2009) 45 Cal.4th 1039, 1050.) “ ‘The purpose of section 1203.2a is to prevent inadvertent consecutive sentences which would deprive defendant of the benefit of section 669, providing that sentence shall be concurrent unless the court expressly orders otherwise. [Citations.]’ ” (*Id.* at p. 1053.)

Here, the probation officer notified the court of Atkins's sentence in a San Mateo County case on December 14, 2016. In August 2017, Atkins moved to "dismiss the execution of his suspended sentence" because the court did not commit Atkins within 60 days of this notice. The district attorney opposed the motion arguing that Atkins "had not yet been sentenced in this probation violation matter," and, contending that Atkins was required to request sentencing before the time limits of section 1203.2a applied. The district attorney made the same argument at the hearing on the motion, stating "the sentence has not been imposed on the probation violation matter." The court denied the motion, finding that Atkins was required to request the court to impose sentence.

Both the district attorney and the court were mistaken in their claim that Atkins was required to request sentencing because in case No. 10009980, on November 15, 2010, the court imposed a sentence but suspended its execution. More specifically, the court sentenced Atkins to 14 years in prison but suspended execution of the sentence and placed Atkins on five years of probation. Accordingly, under section 1203.2a, when the probation officer informed the court of Atkins's confinement for another offense, the court was required to act within 60 days. (See *In re Hoddinott* (1996) 12 Cal.4th 992, 999 ["the court has 60 days from the receipt of notice of the confinement to order execution of sentence (or make other final order) if sentence has previously been imposed Failure to comply with . . . [this] time limit[] divests the court of any remaining jurisdiction."]; see also *Pompi v. Superior Court* (1982) 139 Cal.App.3d 503, 507 [the request requirement in section 1203.2a does not apply when the sentence is imposed but execution is stayed].)

On appeal, the Attorney General concedes "the trial court was obligated to order execution of [Atkins's] 14-year prison sentence within 60 days of learning of his prison commitment for his San Mateo County offense." However, the Attorney General argues Atkins is estopped from arguing the court lost jurisdiction because instead of filing a writ petition challenging the court's denial of his motion to dismiss, Atkins "consented to the court's jurisdiction by voluntarily entering into a new plea agreement." Atkins responds

that “the doctrine of estoppel does not apply to acts undertaken without fundamental jurisdiction.”

“A court lacks jurisdiction in a fundamental sense when it has no authority at all over the subject matter or the parties, or when it lacks any power to hear or determine the case. . . . [¶] Even when a court has fundamental jurisdiction, however, the Constitution, a statute, or relevant case law may constrain the court to act only in a particular manner, or subject to certain limitations. [Citations.] . . . Because an ordinary act in excess of jurisdiction does not negate a court’s fundamental jurisdiction to hear the matter altogether [citation], such a ruling is treated as valid until set aside. [Citation.] A party may be precluded from seeking to set aside such a ruling because of waiver, estoppel, or the passage of time.” (*People v. Ford* (2015) 61 Cal.4th 282, 286–287.)

The references to “jurisdiction” in section 1203.2a concern “the sentencing jurisdiction” a court retains when it grants probation. (*In re Hoddinott, supra*, 12 Cal.4th at p. 994.) Our high court construed a challenge to a sentence imposed under 1203.2a as a claim of “ ‘sentencing error amounting to an excess of jurisdiction.’ ” (*Hoddinott*, at pp. 995–996, fn. 2.) A number of Courts of Appeal have also construed section 1203.2a as addressing acts in excess of jurisdiction, not jurisdiction in the fundamental sense. (See *People v. Davidson* (1972) 25 Cal.App.3d 79, 85 [“the ‘jurisdiction’ referred to in Penal Code, section 1203.2a, is jurisdiction over the person which can be conferred by acquiescence, silence, waiver or estoppel.”]; see also *People v. Martinez* (1975) 46 Cal.App.3d 736, 742 [the “30-day limitation of section 1203.2a of the Penal Code may, of course, be waived.”].) Atkins cites no case that treats the references to “jurisdiction” in section 1203.2a as referring to jurisdiction in the fundamental sense.

We agree with the Attorney General’s argument that Atkins is estopped from arguing the trial court lost jurisdiction. “Whether the party should be estopped depends on a weighing of equities in the particular case, the effect of estoppel on the functioning of the courts, and considerations of public policy.” (*People v. Ford, supra*, 61 Cal.4th at p. 287.) “When . . . the court has jurisdiction of the subject, a party who seeks or consents to action beyond the court’s power as defined by statute or decisional rule may

be estopped to complain of the ensuing action in excess of jurisdiction.” (*In re Griffin* (1967) 67 Cal.2d 343, 347.) For example, in *People v. Ramirez* (2008) 159 Cal.App.4th 1412, the court determined an appellant who consented to an increased sentence as part of a plea bargain was “estopped to complain that the court exceeded its jurisdiction by imposing the modified sentence.” (*Id.* at p. 1428.)

Here, after the court denied Atkins’s motion to dismiss, counsel for Atkins indicated he intended to file a writ and the court continued the matter to provide him an opportunity to do so. Instead of filing a writ petition, counsel for Atkins negotiated a new deal whereby Atkins was permitted to withdraw his 2010 plea, the court vacated Atkins’s 14-year sentence, and Atkins agreed to a new plea agreement. The new deal encompassed “pending open charges.” Atkins pleaded guilty to first degree burglary in case No. 10009980 and to second degree burglary in case No. 14013460 in exchange for a four-year sentence in the first case and a concurrent three-year sentence in the second one. By negotiating and agreeing to this new plea deal, Atkins sought and consented to the court’s January 2018 sentence and he is estopped from arguing the court lost jurisdiction under section 1203.2a. (*In re Griffin, supra*, 67 Cal.2d at p. 347.)

DISPOSITION

The judgment is affirmed.

Jones, P.J.

WE CONCUR:

Needham, J.

Burns, J.

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